Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

ZAKE KOLJCEVIC,
Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sixth Circuit and Board of Immigration Appeals erred as a matter of law and deprived an asylum applicant of due process by refusing to reopen her removal proceedings after the Board of Immigration Appeals summarily dismissed her direct appeal solely because her attorney filed her notice of appeal one day late.

2. Whether an alien's right to petition for asylum includes the right to have administrative appellate review over the denial of her application.

3. Whether the Court should resolve a split among the circuit courts of appeals regarding the presumption that an alien is prejudiced when her attorney's ineffective assistance results in the summary dismissal of her appeal.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Zake Koljcevic respectfully prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Sixth Circuit entered in this case on May 18, 2005 and October 12, 2005, respectively.

OPINIONS BELOW

The opinion of the Immigration Judge (App. E hereto) is unreported. The opinions of the Board of Immigration Appeals (App. C and D) are unreported. The opinion of the Sixth Circuit Court of Appeals on the merits (App. B hereto), of which review is sought, is unreported. The order of the Sixth Circuit denying the petition for panel rehearing and suggestion for rehearing en banc in such case (App. A hereto) is unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit (App. B) was entered on May 18, 2005. The court denied Petitioner's timely petition for rehearing on October 12, 2005 (App. A). The jurisdiction of the Supreme Court is invoked under Supreme Court Rule 10(a), in that the

Sixth Circuit has entered a decision in conflict with decisions of other United States courts of appeal on the same important matter and has sanctioned a decision of the Board of Immigration Appeals that has so far departed from the accepted and usual course of proceedings, as to call for an exercise of this Court's supervisory power.

RELEVANT PROVISIONS INVOLVED

8 C.F.R. § 1003.1(d)(2) provides, in relevant part:

> (i) Standards. A single Board member or panel may summarily dismiss any appeal or portion of any appeal in any case in which:
>
> ...
>
> (G) The appeal is untimely, or barred by an affirmative waiver of the right of appeal that is clear on the record; ...
>
> (iii) Disciplinary consequences. The filing by an attorney ... of an appeal that is summarily dismissed under paragraph (d)(2)(i) of this section may constitute frivolous behavior under § 1003.102(j). Summary dismissal of an appeal under paragraph (d)(2)(i) of this section does not limit the other grounds and procedures for disciplinary action against attorneys or representatives.

8 U.S.C. § 1158(a)(1) provides:

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

8 U.S.C. § 1182(a)(9)(B)(iii)(II) provides:

No period of time in which an alien has a bona fide application for asylum pending under section 1158 of this title shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

8 U.S.C. § 1231(b)(3)(A) provides:

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1252 provides, in relevant part:

(a)(2)(B) Denials of discretionary relief: Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review ...

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

...

(b)(4)(D) The Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

STATEMENT

(i) Nature of the Case

This is a petition for review of the decisions of the Board of Immigration Appeals ("BIA"), and the Sixth Circuit Court of Appeals concluding that an asylum applicant was not prejudiced by her attorney's filing of her notice of appeal to the BIA one day late, resulting in the summary dismissal of her appeal and depriving her of administrative appellate review of her asylum application. The Immigration and Nationality Act, implementing regulations, international human rights law, and longstanding federal and agency precedent steadfastly protect the right of asylum applicants to have their claims heard.

(ii) Proceedings at the Immigration Court

Ms. Zake Koljcevic, a 30-year-old native and citizen of Serbia and Montenegro, applied for admission to the United States on November 4, 2000. The Immigration and Naturalization Service ("INS")[1] denied her application for

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[1] The Homeland Security Act abolished the INS effective March 1, 2003 and transferred its functions to various agencies within the Department of Homeland Security. Pub. L. No. 107-296, 116 Stat. 2135, 2192. The BIA and the Immigration Court remain part of the Department of Justice. This petition refers to the INS with respect to actions it took during its existence and to the appropriate agencies for events occurring after March 1, 2003.

admission and paroled her into the United States to pursue her asylum claim. On March 19, 2002, she filed her application for asylum and withholding of removal with the Immigration Court.

Sitting in Detroit, Michigan, the Immigration Judge ("IJ") denied her applications and ordered her removed to Serbia and Montenegro. App. E.

(iii) Proceedings at the Board of Immigration Appeals

Ms. Koljcevic's attorney filed her notice of appeal one day after the September 18, 2002 deadline. The Department of Homeland Security ("DHS") did not raise the timeliness of her appeal and instead briefed the case on the merits. On October 24, 2003, the BIA summarily dismissed her appeal because it was not timely filed. App. D.

Ms. Koljcevic filed a timely motion for reconsideration, asserting that her previous attorney's ineffective assistance of counsel prejudiced her by depriving her of her right to appeal the denial of her asylum application. The BIA denied this motion on February 24, 2004, finding that although she complied with the procedural requirements for making an ineffective assistance of counsel claim, an attorney's failure to timely file a notice of appeal is not per se